
(1968) 04 CAL CK 0006
In the Calcutta High Court
Case No : Special Suit No. 11 of 1967

N. Guin and Co.

APPELLANT

Vs

Indian Oil Corporation Ltd.

RESPONDENT

Date of Decision : 02-04-1968

Acts Referred:

Arbitration Act, 1940 — Section 2, 20, 20(4), 20(5)
Companies Act, 1956 — Section 396

Citation : (1968) 1 ILR (Cal) 655

Hon'ble Judges : A.N. Sen, J

Bench : Single Bench

Advocate : Salil K. Roy Chowdhuri and P.K. Pal, for the Appellant; Amiya K. Basu and B. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Sen, J.—This proceeding has been instituted u/s 20 of the Arbitration Act for an order that the arbitration agreement be filed in Court and also for an order that an Arbitrator be appointed by the Court.

2. The facts relevant for the purpose of this case may be briefly stated. Indian Refineries Limited, a company within the meaning of the Companies Act, 1956 and a Government of India undertaking, had been carrying on business at Gauhati. Tenders had been invited on behalf of the General Manager, Indian Refineries Limited for the work of construction of 100 Nos. "D" type quarters in sector 1 of the permanent township of the said company at Noonmati, Assam, and in pursuance to the said invitation to tender, M/s. N. Guin & Co. (P.) Ltd., the Plaintiff in the present proceeding, submitted a tender for the said work and it also paid a sum of Rs. 32,210 to the said company being the earnest and/or security money for the said work in terms of the said invitation to tender. By an agreement dated November 4, 1963, between the said Indian Refineries Limited, Noonmati, Gauhati described as the first party of the one part and M/s. N. Guin & Co. (P.) Ltd. called the second party of the other part, the said work was

entrusted to the Plaintiff and it was, inter alia, agreed by and between the parties as follows:

(1) In pursuance of the invitation of tender by the first party as described above and the submission of tender by the second party and acceptance thereof by the first party as described above, the second party agrees to execute the work as per description, quantity, rates and specifications mentioned in Annex. "B" (pp. 5 to 7) including Annex. "B-1" (pp. 1 to 13) and Annex. "B-3" (one page) and as per Annex. "C" (pp. 11 to 15) together with Annex. "D" (pp. 1 to 9) and as per the terms and conditions laid down in the printed booklet "General Conditions and Conditions of Contract for Works on Item Rate Tender" attached herewith as Annex. "E" (pp. 1 to 20) with the condition that the entire work will be completed to the satisfaction of the first party in accordance with the schedule of time mentioned in Clause 2 at p. 3 of Annex. "E" (General Conditions of Contract) and completing the same within a period of eight months calculated from the 10th day after the date of written order to commence the work.

(2) The first party hereby agrees to make payments in accordance with the terms, conditions, rates etc. mentioned in the annexures attached hereto.

(3) It is also agreed between the parties that certain materials mentioned in Annex. "F" (pp. 8 to 10) attached hereto will be issued by the first party to the second party at the prices and under the terms and conditions described therein and the conditions for the issue of materials attached thereto. The costs of materials issued to the second party will be deducted from his bills or any of his other dues.

(4) Decision of the General Manager of the Indian Refineries Limited, Gauhati, on matters relating to or arising out of this agreement shall be final, conclusive and binding on the parties.

3. Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" referred to in Clause 1 hereinbefore stated contains an arbitration clause and is to the following effect:

Clause 25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instruction, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof inclusive of disputes as to the scope and effect of settlement of any claims under the contract by agreement and the liability attaching on breach of such settlement shall be referred to the sole arbitration of the General Manager of the company and if the General Manager is unable or unwilling to act to the sole arbitration of some other person appointed by the

General Manager, willing to act as such arbitrator. It will be no objection to any such appointment that the arbitrator so appointed is a servant of the company and that he had to deal with the matters to which the contract relates and that in the course of his duties as servant of the company he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such General Manager as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the state at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such General Manager of the company as aforesaid should act as arbitrator and, if for any reason that is not possible, the matter is not to be referred to arbitration at all. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the contract. Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

4. In Clause 1 of the said "General Conditions and Conditions of Contract for Works on Item Rate Tender" which deals with definition and interpretation, the term "company" has been defined to mean "Indian Refineries Limited" and the term "General Manager" has been defined to mean "The General Manager of Indian Refineries Limited".

5. By Petroleum Companies Amalgamation Order, 1964, passed by the Central Government u/s 396 of the Companies Act, 1956, and published in the extraordinary Gazette of India on August 31, 1964, the said company, Indian Refineries Limited, was dissolved and was amalgamated with Indian Oil Company Limited and renamed as Indian Oil Corporation Limited with effect from September 1, 1964. By and under the said Amalgamation Order the undertakings of the Indian Refineries Limited stood transferred to and vested in the Indian Oil Companies Limited as from September 1, 1964. The said Amalgamation Order provides:

Saving of contracts etc. Subject: to the other provisions contained in this Order, all contracts, deeds, bonds, agreements and other instruments of whatever nature to which the dissolved company is a party other than the agreement between the dissolved company and Indian Oil Company Ltd. dated 28th March, 1963, subsisting or having effect immediately before the appointed day, shall be of as full force and effect against or in favour of the Company resulting from the amalgamation, as the case may be, and may be enforced as fully and effectually as if, instead of the dissolved company, the Company resulting from the amalgamation has been a party thereto.

6. Disputes and differences have arisen between the parties with regard to the said contract, and N. Guin & Co. (P.) Ltd. has made this application for filing the

arbitration agreement in Court and for the appointment of an Arbitrator by the Court. Indian Oil Corporation Limited, which came into existence as a result of the said Amalgamation Order, is the Defendant in the present proceeding. It is the case of the Plaintiff in the present application that the arbitration clause is contained in Clause 4 of the agreement which has already been set out and which is in the following terms:

The decision of the General Manager of the Indian Refinery Limited, Gauhati, on matters relating to or arising out of the said agreement would be final conclusive and binding on the parties.

In para. 17 of the petition the Plaintiff makes the case that by and under the said Amalgamation Order the entire undertaking of the Indian Refineries Ltd. stood transferred to and vested in the Defendant herein as from September 1, 1964, and subject to other provisions contained in the said Order all contracts, deeds, bonds, agreements and other instruments of whatever nature to which the said Indian Refinery Limited was a party and which were subsisting or having effect against or in favour of the said company resulting from amalgamation, as the case may be, may be enforced as fully and effectually as if instead of the Indian Refinery Limited, the company resulting from the amalgamation has been a party thereto. It is the further case of the Plaintiff that in the premises the Defendant has become liable to pay to the Plaintiff all its claims under and in terms of the said agreement. In para. 22 of the petition the Plaintiff makes a case that inasmuch as the Indian Refinery Limited has ceased to exist, there is no General Manager of Indian Refinery Limited to whom alone the disputes could be referred for arbitration in terms of the agreement and the Plaintiff is desirous of referring the disputes between the parties to arbitration. It is on the above basis the Plaintiff has instituted this proceeding u/s 20 of the Arbitration Act, for the filing of the arbitration agreement in this Court and for the appointment of an Arbitrator by this Court.

7. The Defendant in the affidavit affirmed on January 3, 1968, by Major General Chand Narayan Das, the General Manager of Indian Oil Corporation Limited, Gauhati Refinery, Noonmati, Assam, makes the case that the arbitration clause between the parties is contained in Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender". The said Clause 25 has already been set out in full. In para. 5 of the said affidavit it is stated that the said agreement dated November 4, 1963, by express reference incorporated the "General Conditions and Conditions of Contract for Works on Item Rate Tender" in the contract between the parties; and that Indian Refinery Limited at all material times, until it was amalgamated with Indian Oil Corporation Limited in 1964, had two refineries, one at Noonmati, Gauhati, and another at Barauni respectively, and each of the said refineries was under a general manager. It is further stated that the Plaintiff's contract related to and was with the Noonmati refinery at Gauhati of the said Indian Refinery Limited. In para. 19 of the affidavit the Defendant states--

that by reason of the said Amalgamation Order the contract between the Plaintiff and the Indian Refinery Limited which was subsisting on the date of the said order stood transferred to the Defendant with all the rights and obligations thereunder. The said contract applied mutatis mutandis between the Plaintiff and the Defendant. At the time the contract was entered into and upto the time of the Amalgamation Order, the Noonmati refinery of the Indian Refinery Limited had a General Manager and since then the same refinery of the Defendant at all material times has had, and still has, a General Manager which is the appropriate authority under the said contract for all purposes for which the General Manager, (Noonmati) Gauhati Refinery of the Indian Refinery Limited had been empowered.

In para. 20 of the said affidavit the Defendant makes a case in the alternative that having regard to Clause 25 of the "General Conditions of Contract", there can be no arbitration and there is no enforceable arbitration agreement between the parties.

8. Mr. Pranab Pal, learned Counsel who has argued this matter on behalf of the Plaintiff, has contended that Clause 4 of the agreement provides the arbitration agreement, which is enforceable in the instant case and Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender", has no application in the present case. It is his contention that the opening words of the said Clause 25, to wit, "except where otherwise provided in the Contract" makes the said Clause 25 inoperative as in Clause 4 of the agreement, express provision has otherwise been made. It is his argument that in Clause 4 of the agreement express provision has been made with regard to the arbitration agreement between the parties, and as an express provision has been made in the contract with regard to arbitration, the said Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" has no application. He contends that Clause 4 of the agreement constitutes a valid arbitration agreement between the parties. In support of this contention he has referred to the decision in the case of Governor-General in Council v. Simla Banking & Industrial Co. Ltd., New Delhi AIR 1947 Lah. 215. In, this case Clause 25 of the agreement which was the relevant clause for consideration was in the following terms:

Except where otherwise specified in the contract the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions relating to the meaning of specifications, designs, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship, or materials used on the works, or as to any other question, claim, right, matter or thing whatsoever, in...any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution of failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof.

The Subordinate Judge has held that this clause did not fall within the definition of an arbitration agreement as contemplated by Section 2(a), Arbitration Act (X) of 1940. On an appeal being taken to the High Court, Abdul Rahaman, J., who on behalf of the Division Bench delivered the judgment, with which the learned Acting Chief Justice agreed, observed:

The first question that arises for determination is covered by issue 1 framed by the Subordinate Judge on 7-3-1942. Finding that the words "arbitration", "arbitrator" or "arbitration agreement" did not appear in the clause and there was nothing to suggest in it that the parties had agreed to submit their differences to arbitration, the Subordinate Judge held on a review of various cases cited on behalf of the parties before him that the agreement contained in Clause 25 did not indicate any animus arbitrandi and was more in the nature of a reference to a valuer or an assessor.

I do not find myself in agreement with this finding. It is true that the words "arbitration", "arbitrator" or "arbitration agreement" do not appear in the clause but that is, in my view, immaterial as long as the parties can be found to have agreed to allow the matter to be decided by a person of their own selection whose decision was to be final, conclusive and binding on them. A perusal of the clause would show that not only the questions as the "quality of workmanship or materials used on the work" were left to be decided by "the Superintending Engineer of the Circle for the time being" but "any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract" etc., were, after they had arisen between the parties, also agreed to be left to him for his decision.

(Paragraphs 3 and 4, p. 216 of the report.)

The learned judge further observes:

...and inasmuch as the matter was to be decided under Clause 25 of the agreement by a person whose decision was to be final, conclusive and binding on the parties, the person so appointed cannot but be, in my judgment, regarded as an arbitrator, despite the fact that he was an employee of one of the parties.

(Paragraph 5, p. 217 of the report)

Mr. Pal has also referred to and relied on the decision in the case of *Dewan Chand v. The State of Jammu & Kashmir* AIR 1961 J & K 58. In this case the clause in question was in the following terms:

...For any dispute between the contractor and the Department the decision of the Chief Engineer, P.W.D. Jammu & Kashmir, will be final and binding upon the contractor.

The learned Judge, following the decision of the Lahore High Court *Supra*, para. 6-8, pp. 59-60, held that the said clause constituted an arbitration agreement between the parties. The learned Judge observed:

The clause thus contained in the agreement is in writing and is signed by both parties. There is no dispute on this question. Mr. Prakash appearing for the Plaintiff argued that as there are no words in this agreement showing that there has been actual submission or reference to arbitration by any of the parties, hence this is not an arbitration agreement within the meaning of Section 2(a) of the Arbitration Act. It is also contended that the word "arbitration" has not also been used in this clause.

Section 2(a) of the Arbitration Act reads as under:

Arbitration Agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

A perusal of this clause clearly shows that all that the statute requires is that there should be a written agreement to submit a dispute to arbitration. It is not necessary that the word "reference" or "arbitration" should actually be used in the agreement, if the agreement in substance amounts to an arbitration agreement within the meaning of Section 2, Clause (a) of the Arbitration Act.

The clause of the agreement quoted above clearly indicates that the parties have agreed that any dispute between the contractor and the department i.e., the Plaintiff and the Defendant should be referred to the Chief Engineer and that his decision shall be final and binding on the parties. It is true that the word "reference" is not used in this clause nor it has been mentioned that the Chief Engineer should be the arbitrator, but looking to the substance of the clause, there can be no doubt that the parties agreed that any dispute between them should be settled by the Chief Engineer.

In my opinion, whenever there is an arbitration clause the Court should look to the substance rather than to the form of it and the mere fact that word like "reference" or "arbitrator" do not find place in the said agreement does not show that the agreement is not an arbitration agreement within the meaning of Section 2(a) of the Arbitration Act.

Mr. Pal has also referred to the following passage in Russell on Arbitration, 17th ed. p. 30, under head "Certification and arbitration":

There is a practice, not uncommon, for a contract to provide that something shall be done thereunder "to the satisfaction of a named person, who is to issue a certificate to that effect. The question then arises as to whether the contract has provided for an arbitration or a certification, the importance of the distinction lying in the fact that an award under an arbitration cannot, as can a certification, be challenged on the ground that it is unreasonable (though both can be set aside for fraud), while on the other hand an award must be made independently, for independence is the essence of the arbitral function though there is no general rule of law prohibiting the influencing of certifiers.

The tests for determining whether the contract has provided for an arbitration or a certification include the following:

(a) Whether the certificate is intended to embody a decision that is final and binding on the parties. If it is then it is in effect an award.

(b) Whether (in the case that the determination is left to an agent of one of the parties) the agent is or is not intended to function independently of the principal. If he is not it cannot be an arbitration.

(c) Whether the "certifier" has merely to decide whether the requirements of the contract have been met, or whether he is entitled to impose a standard of his own, it having been stated: "so far as I am aware, there is no case in which a certifier who has to certify only according to his own standards has been held to be an arbitrator".

9. Mr. Pal has also cited decision in the case of *Minister Trust Ltd. v. Traps Tractors Ltd.* (1954) 1 W.L.R. 963 (964) and has relied on the following observations:

What has to be ascertained in each case is whether the agent is or is not entitled to function independently of the principal. The mere use of the word "certificate" is not decisive. Satisfaction does not necessarily alter its character because it is expressed in the form of a certificate. The main test appears to be whether the certificate is intended to embody a decision that is final and binding on the parties. If it is, then it is in effect an award, and it has the attributes of its arbitral character. It cannot be attacked on the ground that it is unreasonable, as the opinion of a party or the certificate of one who is merely an agent probably can. On the other hand, it must be made independently, for independence is the essence of the arbitral function.

10. Mr. Pal contends that the said arbitration agreement between the parties, contained in Clause 4 of the contract, is kept alive upon dissolution of the Indian Refineries Limited and stands transferred to and vested in the Defendant by virtue of the provisions contained in the Amalgamation Order. It is his contention that although the arbitration agreement between the parties is kept alive but the Arbitrator named in the said agreement, namely, the General Manager of the Indian Refineries Limited, Gauhati, cannot act as the Arbitrator as there is no such post or person at the present. It is the contention of Mr. Pal that the said arbitration agreement, now subsisting between the parties, clearly indicates the intention of the parties to refer the disputes to arbitration and the same does not show any contrary intention that the disputes are not to be referred to the arbitration of any other person and the Court should supply the vacancy that has now arisen in consequence of there being no General Manager of the Indian Refineries Limited, Gauhati. He has referred to the decision in the case of *Yar Muhammad v. Ghulam Sarwar* AIR 1950 Lah. 145 (147) para. 5 and has relied on the following observations of the Court:

The plain meaning of Sub-section (4) of Section 20 is that in the absence of "a sufficient cause" the Court shall order the agreement to be filed and shall call upon the arbitrator, mentioned in the agreement of the parties or otherwise agreed to by them, to decide the dispute, and if the parties cannot agree, then

the Court shall have a right to appoint another arbitrator. The authority of the Court has thus been considerably widened. Previously the Court was not entitled to fill up the place of an arbitrator who had refused to act, but now if the arbitrator named in the agreement declined to act, the Court could ask the parties to agree to another person as arbitrator, and if the parties still could not come to an agreement, the Court could intervene. In other words, the omission or failure on the part of the arbitrator first appointed by the parties would not make the agreement wholly ineffectual, but the agreement could still be kept alive by the parties by agreement and failing that, by the Court itself. After that had been done, Sub-section (5) comes in and the arbitration shall proceed in accordance with the other provisions of the Act.

11. Mr. A.K. Basu, learned Counsel for the Respondent, has submitted that Clause 4 of the agreement does not constitute the arbitration agreement between the parties but the arbitration agreement is contained in Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender". He has argued that under Clause 1 of the agreement the terms and conditions laid down in "General Conditions and Conditions of Contract for Works on Item Rate Tender", including the said Clause 25 which contains the general arbitration clause, are expressly and clearly attracted and attached to the contract between the parties. He contends that the opening-words in the said Clause 25, namely, "except where otherwise provided in the contract" to which reference has been made by the learned Counsel for the applicant, do not render the said clause inapplicable by virtue of the provision contained in Clause 4 of the agreement and have no bearing on the question whatsoever. It is his contention that the said words in the said Clause 25 refer to certain other clauses in the agreement which take out some of the disputes and questions that may arise between the parties in relation to the contract out of the purview of the arbitration agreement. It is his argument that the said opening words only qualify "all questions and disputes" between the parties and have nothing to do with the question of the arbitration agreement between the parties contained in the said Clause 25 or the applicability thereof. Mr. Basu has next contended that under the provisions of the Petroleum Companies' Amalgamation Order, 1964, the Defendant should be treated to be a party to the contract and, wherever in the said contract the name of the Indian Refineries Limited appears, the name of the Defendant company should be read. It is his argument that there is a valid arbitration agreement between the parties in terms of Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate and Tender" and the General Manager of the Gauhati Refinery, Noonmati, of the Defendant company or any person nominated by him as mentioned in the said clause is the person competent to act as arbitrator. Mr. Basu, therefore, submits that the said arbitration agreement may be filed in Court, but the Court cannot and should not make any order appointing any arbitrator. Mr. Basil has further submitted that in the event it be held that the person named in the arbitration agreement is not in a position to act as the arbitrator, the Court cannot and should not appoint any

other arbitrator as it was the clearest intention of the parties that the arbitration should be to the person mentioned in Clause 25 and to no other person. He has drawn my particular attention to the following provision in the said Clause 25:

It is also a term of this contract that no person other than the person appointed by the General Manager of the company as aforesaid should act as arbitrator and, if for any reason that is not possible, the matter is not to be referred to the arbitration at all.

12. Mr. Basu has argued that Clause 4 of the contract does not constitute in the instant case the arbitration agreement between the parties and at the most the said clause may be said to be a modification of the arbitration agreement contained in Clause 25.

13. In support of his contention that the General Manager of the Gauhati Refinery at Noonmati of the Defendant should be appointed arbitrator and his name should be read in place of the General Manager of Indian Refineries Ltd., Gauhati, in the contract in consequence of the Amalgamation Order, Mr. Basu has referred to and relied on the following observation of Lord Asquith of Bishopstone in the case of *East End Dwellings Co. Ltd. v. Finsbury Borough Council* A.I.R.(1951) 2 587 (599):

If one is bidden to treat an imaginary slate of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.

14. In the instant case I am unable to accept the contention of Mr. Pal that Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" which contains the arbitration clause has no application. Clause 1 of the agreement between the parties, in my opinion, expressly attracts the terms and conditions laid down in "General Conditions and Conditions of Contract for Works on Item Rate Tender" including the said Clause 25. In my opinion the contention of Mr. Basu, that the words "except where otherwise provided in the contract" in Clause 25 on which Mr. Pal has relied, do not make the said clause inapplicable by virtue of the provision contained in Clause 4 of the agreement, is sound; and in my opinion Mr. Basu rightly contends that the said words in the said Clause 25 have reference to those other clauses in the terms and conditions contained in "General Conditions and Conditions of Contract for Works on Item Rate Tender" which except some of the disputes and questions form the arbitration clause and take them out of the operation of the arbitration agreement. The said words "except where otherwise provided in the contract" in Clause 25 only qualify "all questions and disputes" between the parties and do not make the whole of the said clause inapplicable. In my opinion Clause 4 of the agreement in the instant case operates only in modification of the said Clause 25 which contains the general arbitration clause. The effect of Clause 4 in the instant case, to my mind, is to modify the said general arbitration clause

contained in Clause 25 with the result that the General Manager of the Indian Refineries Ltd., Gauhati, becomes the only competent person to adjudicate upon the disputes relating to or arising out of the said agreement. I am of the opinion that in the instant case the arbitration agreement is contained in Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" as modified by Clause 4, with the result that Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" continues to be the governing arbitration agreement except that the power of the General Manager to appoint any other person to act as such arbitrator is curtailed and the General Manager of the Indian Refineries Limited, Gauhati, becomes the only authority competent to act as such arbitrator. If Clause 25 had not been applicable, there would have been a great deal of force in the contention of Mr. Pal that the arbitration agreement between the parties is contained in Clause 4. As in my view, Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" is expressly attracted in the instant case and constitutes the principal arbitration agreement, the authorities relied on by Mr. Pal are not of any great assistance. If Clause 25 was not there or if the said clause was not applicable, I might have held on the authorities cited by Mr. Pal that Clause 4 of the contract constituted the arbitration agreement between the parties. In view, however, of my finding that Clause 25 is attracted and constitutes the main arbitration agreement, I hold that Clause 4 of the contract in the instant case is not the clause which contains the arbitration agreement between the parties and the said clause only modifies the arbitration agreement contained in Clause 25 of the "General Conditions and Condition, of Contract for Works on Item Rate Tender".

15. I have already observed that the effect of the modification of the arbitration agreement contained in Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender" by Clause 4 of the contract is that only the General Manager of the Indian Refineries Limited, Gauhati, becomes the competent person to act as arbitrator in respect of disputes in relation to or arising out of the agreement. As a result of the Amalgamation Order, Indian Refineries Limited stands dissolved and all contracts, deeds, bonds, agreements and other instruments of whatever nature to which the dissolved company was a party, remained in full force and effect against or in favour of the company resulting from the amalgamation. The agreement in question which was subsisting at the appointed day before the amalgamation had taken place remains, therefore, effective and becomes enforceable against the company which resulted from the amalgamation and which is the present Defendant. The question, however, that requires careful consideration is what is the effect and impact of this amalgamation on the arbitration agreement between the parties.

16. By virtue of the provisions contained in the Amalgamation Order the contract in question remains in full force and effect against or in favour of the company resulting from the amalgamation, as the case may be, and may be enforced as fully and effectually as if instead of the dissolved company, the company

resulting from the amalgamation has been a party thereto. The arbitration agreement contained in Clause 25 of the "General Conditions and Conditions of Contract for Works on Item Rate Tender", as modified by Clause 4 of the agreement, also forms a part of the contract between the parties. The question is whether and how far the said arbitration agreement can be enforced. As I have already observed the arbitration agreement in the instant case clearly contemplates that the disputes between the parties will be referred to the arbitration of the General Manager of the Indian Refineries Limited, Gauhati, for his arbitration and decision only and to no other person. The agreement as contained in Clause 25 expressly provides that no other person should act as such arbitrator and, if for any reason this is not possible, there will be no reference to arbitration at all. As a result of the Amalgamation Order, Indian Refineries Limited now stands dissolved and there is no person occupying the post of the General Manager of the Indian Refineries Limited, Gauhati. The dissolution of the company operates as its civil death and although all the rights and obligations of the dissolved company are preserved by the Amalgamation Order which provides that all contracts, deeds, bonds, agreements and other instruments of whatever nature to which the dissolved company is a party subsisting or having effect immediately before the appointed day, shall be of as full force or effect against or in favour of the company resulting from the amalgamation, as the case may be, and may be enforced as fully and effectually as if instead of the dissolved company, the company resulting from the amalgamation has been a party thereto, it cannot in my view be contended that the arbitration agreement in the instant case can be enforced by any of the parties to this proceeding in the changed conditions. With the dissolution of Indian Refineries Limited there cannot be any person occupying the post of the General Manager of Indian Refineries Limited, Gauhati. It is a case of civil death of the company with the result that there cannot be and will never be a General Manager of the Indian Refineries Limited, Gauhati, which has ceased to have its existence. As in my view, only the General Manager of the Indian Refineries Limited, Gauhati, is the person competent to act as arbitrator as contemplated by the arbitration agreement and no other person is competent to act as such arbitrator and there is to be no arbitration if the General Manager for any reason is not in a position to act as arbitrator, there cannot be any arbitration between the parties. The Amalgamation Order of 1964 undoubtedly provides that a contract may be enforced as fully and effectually as if, instead of the dissolved company, the company resulting from the amalgamation has been a party thereto, but the said provision in my view does not authorise a change in the personnel of the Arbitrator in the instant case; and in my view it will not be right to hold in view of the said provision in the Amalgamation Order that the Court should read or substitute the General Manager of Indian Oil Corporation Limited, Gauhati Refinery, Noonmati, in place of the General Manager of the Indian Refineries Limited, Gauhati, in Clause 4 of the agreement. It has to be noted that under the Defendant company each of the refineries has its own General Manager; and I see no reason why the name of the General Manager of the

Gauhati Refinery should be read or substituted. The observations of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* Supra. relied on by Mr. Basu, do not in my opinion support this proposition. An arbitration agreement which may have the effect of ousting the jurisdiction of the Courts and of conferring such jurisdiction on a chosen Tribunal of the parties, will have to be strictly construed; and only the true intention of the parties as manifested in or gathered from the agreement, has to be given effect to, if possible. If for some reason or other the said intention is not made effective or cannot be made effective, it is not for the Court to create between the parties any new agreement which may be made effective or which may be worked out. In the instant case the parties have agreed to refer their disputes to the arbitration of the General Manager of Indian Refineries Limited, Gauhati, and to be bound by his decision only and the parties have further agreed that if for any reason whatsoever the General Manager of Indian Refineries Limited, Gauhati, is not in a position to act as Arbitrator, there will be no arbitration at all. By reason of the dissolution there is or can be no General Manager of Indian Refineries Limited, Gauhati, competent to act as Arbitrator and, therefore, there cannot be any arbitration between the parties. The provisions of the Amalgamation Order undoubtedly preserve the rights and obligations of the parties, but the said provisions in my view do not and cannot alter or affect the nature of the arbitration agreement between the parties and cannot make the same enforceable. I am, therefore, of the opinion that the arbitration agreement in the instant case cannot be enforced.

17. In the result, this application fails and is dismissed. There will be no order as to costs.